

No. 13729

United States
Court of Appeals
for the Ninth Circuit.

GEORGE FRENCH, JR., and MARY E.
FRENCH,

Appellants,

vs.

HAROLD A. BERLINER, Former Collector of
Internal Revenue,

Appellee.

Transcript of Record

Appeals from the United States District Court,
Northern District of California,
Northern Division.

FILED

JUL 14 1953

PAUL P. O'BRIEN
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Plaintiffs.

CHAUNCEY TRAMUTOLO,
United States Attorney;

CHARLES ELMER COLLETT,
WILLIAM H. LALLY;

Assistant U. S. Attorneys;

Attorneys for Defendants.

THE CHEMISTRY OF THE CARBON DIOXIDE SYSTEM

BY

W. H. KEMP

AND

W. H. KEMP

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W. H. KEMP

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W. H. KEMP

In the Northern Division of the United States
District Court for the Northern District of
California

No. 6257

GEORGE FRENCH, JR.,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,
enue,

Defendant.

COMPLAINT FOR REFUND OF INCOME
TAXES ILLEGALLY COLLECTED

Now comes the above-named plaintiff and complains of the above-named defendant and for cause of action alleges as follows, to wit:

I.

That said defendant, James G. Smyth, is a resident of the City and County of San Francisco, State of California; that defendant, James G. Smyth is now, and at all times relevant herein, has been the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that the Court has jurisdiction over this matter under the provisions of Title 28, Sec. 1340, United States Code.

II.

That said plaintiff is now and at all times herein mentioned, has been a citizen of the United States of America, and resident of the City of Stockton,

County of San Joaquin, State of California, and within the said Northern District of California. That at all times material to this proceeding, plaintiff was married and his wife's name is Mary E. French, that during all such times all income received by plaintiff was community income and was reported by plaintiff and his said wife on a community basis, each filing a separate income tax return for the year 1943, and all prior years herein mentioned. That within the time allowed by law therefor, plaintiff and his said wife have caused to be prepared, executed and filed with said defendant, their respective income tax returns for the year 1943; that at all times herein mentioned plaintiff kept his books of account and filed his income tax returns on the calendar year basis and on the cash basis of accounting.

III.

That at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department, was a partnership carrying on a general contracting business at Stockton, California; that at all said times plaintiff was employed as Superintendent of construction by said Oranges Brothers Construction Department. That such employment was on a fixed salary and commission basis under an agreement of employment whereby plaintiff was to receive a fixed salary of \$150.00 per month, and also was entitled to receive one-half ($\frac{1}{2}$) of the net profits of said construction and contracting business. That plaintiff received

for his personal services under said contract of employment, a total compensation of \$429,196.69, of which 4.85 per cent, or \$20,827.87 was received prior to January 1, 1943, and 95.15 per cent, or \$408,368.82 was received during the taxable year 1943, to wit:

The sum of \$75,062.50 on February 8, 1943; and \$333,306.32 after May 31, 1943.

That plaintiff, in filing his income tax return for the year 1943, computed his tax on said two payments received in 1943, in accordance with the provisions of Internal Revenue Code, Section 107(a), allocating each payment over the period of service preceding the receipt of such payment which comprised fifty-one and fifty-five months, respectively.

That as so computed, plaintiff's total income and Victory tax liability for the taxable year of 1943 on all income received from his employment by Oranges Brothers Contruction Department and from other sources amounted to \$69,150.12. That the Commissioner of Internal Revenue erroneously assessed a total income and Victory tax liability for said year of 1943, in the amount of \$97,293.22, and erroneously assessed a deficiency of \$32,718.59 consisting of taxes in the amount of \$28,143.10 and interest in the amount of \$4,575.49. That said erroneously assessed deficiency in the amount of \$32,718.59 was paid in full by the plaintiff to the defendant, as Collector of Internal Revenue for the First Collection District of California, on the following dates, to wit:

\$27,779.18 on November 26, 1946;

\$4,939.41 on June 5, 1947.

IV.

That on the 28th day of December, 1948, and within the time allowed under the provisions of IRC Sec. 322(b) (3), plaintiff caused to be prepared, executed and filed a claim for the refund of said sum of \$32,718.59 illegally assessed by the Commissioner of Internal Revenue and illegally collected by the defendant on the above said dates; that a copy of said refund claim, marked Exhibit "A" is annexed hereto and incorporated herein with the same force and effect as if here set forth in haec verba. That said refund claim was disallowed by the Commissioner of Internal by notice dated November 7, 1949, under Symbol No. IT:CL:CC:Rej.

V.

That no part of said sum of \$32,718.59 ever was or is legally owing or payable to the said defendant as and for an income tax of plaintiff for the calendar year 1943, or for any period, or otherwise, or at all. That said amount and the whole thereof, was erroneously collected by defendant from plaintiff; that no part of said sum has been repaid or scheduled for refund to plaintiff, and the whole thereof, together with interest thereon from the time it was paid to the defendant is now due, owing and unpaid from defendant unto plaintiff.

Wherefore, plaintiff prays for judgment in his favor and against the defendant, in the sum of

\$32,718.59, together with interest on said sum from the respective dates of payment, pursuant to the provisions of IRC Sec. 3771, and for such other and further relief as the Court may find meet and just in the premises.

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,

Attorneys for Plaintiff.

Exhibit A

Form 843

Treasury Department

Internal Revenue Service

(Revised July, 1947)

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

- [] Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- [] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- [] Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of San Joaquin—ss.

Name of taxpayer or purchaser of stamps: George
French, Jr.

Business address: Post Office Box No. 307, Stock-
ton 100, California.

Residence: Stockton, California,

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: First District of California (94).
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1943, to Dec. 31, 1943.
3. Character of assessment or tax: income and victory taxes.
4. Amount of assessment, \$97,293.22; dates of payment during 1943; 11/26/1946; 6/5/1947.
5. Date stamps were purchased from the Government:
6. Amount to be refunded: Taxes, \$28,143.10, interest, \$4,575.49, total \$32,718.59.
7. Amount to be abated (not applicable to income, gift, or state taxes)..... \$.....
8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on December 31, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

The claimant was assessed in error deficiencies in income and victory taxes for the taxable period shown above, which were paid in full on November 26, 1946, and June 5, 1947, on the basis of a report of internal revenue agent Robert L. Driscoll dated July 5, 1945, and a conference statement under the symbols "IRA: Conf./HVH" issued by the office of the internal revenue agent in charge at San Francisco, California, under date of February 25, 1947, which report and statement are incorporated herein by reference. The whole amount of the deficiencies, \$28,143.10 is claimed for refund with the interest paid thereon, \$4,575.49, together with the interest on the total overpayment claimed for refund according to law.

The claimant claims specifically as a basis for the refund claimed herewith that his Form 1040 income and victory tax return for the calendar year 1943, showing a total income and victory tax liability of \$69,150.12, and his amended Form 1040 income tax return for the calendar year 1942, were in all respects true and correct returns of his taxable income and victory taxes for those years, and that the assessments of deficiencies on the said return for the calendar year 1943 were, with reference to the report and statement described above and incorporated herein by reference, based on the following errors:

- (1) The disallowance of the application of the provisions of section 107, Internal Revenue

Code, in limitation of his income and victory tax liability on compensation for services received in 1943 for services during and for a period of more than 36 months, as computed in his said return for 1943;

(2) The computation of his income from services during the years 1942 and 1943 on the theory that, and as if he had been a member of a partnership, Oranges Brothers Construction Division; and

(3) In the alternative to the assignments of error 1) and 2) above, the failure of the said report and statement to allow in the computation of victory tax net income for the year 1943 a deduction for California income taxes on the amounts considered and treated in the said report and statement to be distributive income from the said partnership.

The verification of this claim by the undersigned agent is authorized by the claimant's power of attorney made August 31, 1946, and filed thereafter in the office of the internal revenue agent in charge at San Francisco, California, a signed and verified copy of which power is attached hereto.

GEORGE FRENCH, JR.,

By /s/ FRANK C. SCOTT,

His Attorney-in-Fact.

Subscribed and sworn to before me this 28th day of December, 1948.

[Seal] /s/ MARGARET E. JARDINE,
Notary Public.

Duly verified.

[Endorsed]: Filed December 9, 1949.

In the Northern Division of the United States
District Court for the Northern District of
California

No. 6258

MARY E. FRENCH,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,
enue,

Defendant.

COMPLAINT FOR REFUND OF INCOME
TAXES ILLEGALLY COLLECTED

Now comes the above-named plaintiff and complains of the above-named defendant and for cause of action alleges, as follows, to wit:

I.

That said defendant, James G. Smyth, is a resident of the City and County of San Francisco, State of California; that defendant, James G. Smyth, is now, and at all times relevant herein has been the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that the Court has jurisdiction over this matter under the provisions of Title 28, Sec. 1340, United States Code.

II.

That said plaintiff is now and at all times herein mentioned, has been a citizen of the United States

of America, and a resident of the City of Stockton, County of San Joaquin, State of California, and within the said Northern District of California. That at all times material to this proceeding, plaintiff was married, and her husband's name is George French, Jr.; that during all such times all income of plaintiff was derived from community income which was reported by plaintiff and her husband on a community basis, each filing a separate income tax return for the year 1943, and all prior years herein mentioned. That within the time allowed by law therefor, plaintiff and her said husband have caused to be prepared, executed and filed with said defendant, their respective income tax returns for the year 1943; that at all times herein mentioned plaintiff kept her books of account and filed her income tax returns on the calendar year basis and on the cash basis of accounting.

III.

That at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carrying on a general contracting business at Stockton, California; that at all times plaintiff's husband was employed as Superintendent of construction by said Oranges Brothers Construction Department. That such employment was on a fixed salary and commission basis under an agreement of employment whereby plaintiff's husband was to receive a fixed salary of \$150.00 per month, and also was entitled to receive one-half of the net profits of said con-

struction and contracting business. That plaintiff's husband received for his personal services under said contract of employment, a total compensation of \$429,196.69, of which 4.85 per cent or \$20,827.87 was received prior to January, 1943, and 95.15 per cent, or \$408,368.82 was received during the taxable year 1943, to wit:

The sum of \$75,062.50 on February 8, 1943;
and \$333,306.32 after May 31, 1943.

That plaintiff, in filing her income tax return for the year 1943, computed her tax on her community share of said two payments received in 1943, in accordance with the provisions of Internal Revenue Code Section 107(a), allocating each payment over the period of service preceding the receipt of such payment by her husband, which comprised fifty-one and fifty-five months, respectively. That as so computed, plaintiff's total income and Victory tax liability for the taxable year of 1943 on all income taxable to her amounted to \$69,149.54. That the Commissioner of Internal Revenue erroneously assessed a total income and Victory tax liability for said year of 1943 in the amount of \$97,291.87, and erroneously assessed a deficiency of \$32,717.65 consisting of taxes in the amount of \$28,142.33 and interest in the amount of \$4,575.32. That said erroneously assessed deficiency in the amount of \$32,717.65 was paid in full by the plaintiff to the defendant, as Collector of Internal Revenue for the First District of California, on the following dates, to wit:

\$27,779.18 on November 26, 1946;
\$4,938.47 on June 5, 1947.

IV.

That on the 28th day of December, 1948, and within the time allowed under the provisions of IRC Sec. 322(b)(3), plaintiff caused to be prepared, executed and filed a claim for the refund of the said sum of \$32,717.65 illegally assessed by the Commissioner of Internal Revenue and illegally collected by the defendant on the above said dates; that a copy of said refund claim, marked Exhibit "A" is annexed hereto and incorporated herein with the same force and effect as if here set forth in haec verba. That said refund claim was disallowed by the Commissioner of Internal Revenue by notice dated November 7, 1949, under Symbol No. IT:Cl:CC:Rej.

V.

That no part of said sum of \$32,717.65 ever was or is legally owing or payable to the said defendant, as and for an income tax of plaintiff for the calendar year 1943, or for any period, or otherwise, or at all. That said amount and the whole thereof, was erroneously collected by defendant from plaintiff; that no part of said sum has been repaid or scheduled for refund to plaintiff, and the whole thereof, together with interest thereon from the time it was paid to the defendant is now due, owing and unpaid from defendant to plaintiff.

Wherefore, plaintiff prays for judgment in her favor and against the defendant, in the sum of \$32,717.65, together with interest on said sum from the respective dates of payment, pursuant to the provisions of IRC Sec. 3771, and for such other and

further relief as the Court may find meet and just in the premises.

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,

Attorneys for Plaintiff.

EXHIBIT A

Form 843

Treasury Department

Internal Revenue Service

(Revised July, 1947)

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

- [] Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- [] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- [] Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,

County of San Joaquin—ss.

Name of taxpayer or purchaser of stamps: Mary
E. French.

Business address: Post Office Box No. 307, Stockton 100, California.

Residence: Stockton, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: First District of California (94).
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1943, to Dec. 31, 1943.
3. Character of assessment or tax: Income and victory taxes.
4. Amount of assessment, \$97,291.87; dates of payment during 1943: 11/26/1946; 6/5/1947.
5. Date stamps were purchased from the Government
6. Amount to be refunded: Taxes, \$28,142.33; interest, \$4,575.32; total, \$32,717.65.
7. Amount to be abated (not applicable to income, gift, or estate taxes) \$.....
8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on December 31, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

The claimant was assessed in error deficiencies in income and victory taxes, for the period shown above, which were paid in full on November 26, 1946, and June 5, 1947, on the basis of a report of internal revenue agent Robert L. Driscoll dated July 5, 1945, and a conference statement under the

symbols "IRA:Conf./HVH" issued by the office of the internal revenue agent in charge at San Francisco, California, under date of February 25, 1947, which report and statement are incorporated herein by reference. The whole amount of the deficiencies, \$28,142.33, is claimed for refund with the interest paid thereon, \$4,745.32, together with interest on the total overpayment claimed for refund according to law.

The claimant claims specifically as a basis for the refund claimed herewith that her Form 1040 income and victory tax return for the calendar year 1943 showing a total income and victory tax liability of \$69,149.54, and her amended Form 1040 income tax return for the calendar year 1942, were in all respects true and correct returns of her taxable income and income and victory taxes for those years, and that the assessments of deficiencies on the said return for the calendar year 1943 were, with reference to the report and statement described above and incorporated herein by reference, based on the following errors:

(1) The disallowance of the application of the provisions of section 107, Internal Revenue Code, in limitation of her income and victory tax liability on compensation for her husband's services (in which the claimant had a community property interest) received in 1943 for services during and for a period of more than 36 months, as computed in his and her income and victory tax returns for 1943;

(2) The computation of her income from

her husband's services during the years 1942 and 1943 on the theory that, and as if her said husband had been a member of a partnership, Oranges Brothers Construction Division; and

(3) In the alternative to the assignments of error 1) and 2) above, the failure of the said report and statement to allow in the computation of victory tax net income for the year 1943 a deduction for California income taxes on the amounts considered and treated in the said report and statement to be distributive income of the claimant from the said partnership.

The verification of this claim by the undersigned agent is authorized by the claimant's power of attorney made August 31, 1946, and filed thereafter in the office of the internal revenue agent in charge at San Francisco, California, a signed and verified copy of which power is attached hereto.

MARY E. FRENCH,

By /s/ FRANK C. SCOTT,

Her Attorney-in-Fact.

Subscribed and sworn to before me this 28th day of December, 1948.

[Seal] /s/ MARGARET E. JARDINE,
Notary Public.

Duly verified.

[Endorsed]: Filed December 9, 1949.

[Title of District Court and Cause.]

No. 6257

ANSWER

The defendant, James G. Smyth, Collector of Internal Revenue for the First Collection District of California, by his attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, for answer to the complaint herein states:

I.

Admits the allegations contained in paragraph I of the complaint.

II.

Denies the allegations contained in paragraph II of the complaint, except that defendant admits that plaintiff was a citizen of the United States of America and a resident of the City of Stockton, County of San Joaquin, State of California, and within the Northern District of California; that at all times material to this proceeding he was married and his wife's name is Mary E. French; and that plaintiff and his wife each filed a separate federal income tax return for the year 1943.

III.

Denies the allegations contained in paragraph III of the complaint, except that defendant admits that at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carrying on a general contracting business at Stockton, Califor-

nia; that plaintiff in filing his income tax return for the year 1943 computed his income tax on two payments received in that year from the said Oranges Brothers Construction Department in accordance with the provisions of Section 107(a) of the Internal Revenue Code; and that the Commissioner of Internal Revenue, after investigation and audit of plaintiff's income tax return for the year 1943, determined a deficiency of \$32,718.59, representing income tax in the amount of \$28,143.10 and interest thereon in the amount of \$4,575.49, which amounts were paid by plaintiff to the defendant as follows:

\$27,779.18 on November 25, 1946;

\$4,939.41 on June 5, 1947.

IV.

For answer to the allegations contained in paragraph IV of the complaint, defendant admits that on December 29, 1948, plaintiff filed a claim for refund of the sum of \$32,718.59 assessed as a deficiency in income tax and interest against plaintiff by the Commissioner of Internal Revenue with respect to the taxable year 1943, but defendant denies that said deficiency in income tax and interest was illegally assessed by the Commissioner and/or illegally collected by the defendant. Further answering the allegations contained in paragraph IV of the complaint, defendant admits that Exhibit A annexed thereto is a true copy of plaintiff's claim for refund referred to therein, but defendant denies each and every allegation of fact contained in said

claim for refund not hereinbefore specifically admitted or denied; and defendant admits that said claim for refund was disallowed by the Commissioner of Internal Revenue under date of November 7, 1949.

V.

Denies each and every allegation contained in paragraph V of the complaint.

VI.

Denies each and every allegation contained in the complaint not hereinbefore specifically admitted or denied.

Wherefore, the defendant prays that the complaint herein be dismissed and that the defendant be given judgment in his favor and against the plaintiff, together with costs and disbursements of this action.

/s/ FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed June 16, 1950.

[Title of District Court and Cause.]

No. 6258

ANSWER

The defendant, James G. Smyth, Collector of Internal Revenue for the First Collection District of California, by his attorney, Frank J. Hennessy, United States Attorney for the Northern District of California, for answer to the complaint herein states:

I.

Admits the allegations contained in paragraph I of the complaint.

II.

Denies the allegations contained in paragraph II of the complaint, except that defendant admits that plaintiff is a citizen of the United States of America and a resident of the City of Stockton, County of San Joaquin, State of California, and within the Northern District of California; that at all times material to this proceeding she was married and her husband's name is George French, Jr.; and that plaintiff and her husband each filed a separate federal income tax return for the year 1943.

III.

Denies the allegations contained in paragraph III of the complaint, except that defendant admits that at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carrying on a

general contracting business at Stockton, California; that plaintiff in filing her federal income tax return for the year 1943 computed her income tax on two payments received by her in 1943 from said Oranges Brothers Construction Department in accordance with the provisions of Section 107(a) of the Internal Revenue Code; that after investigation and audit of her income tax return for the year 1943, the Commissioner of Internal Revenue determined and assessed a deficiency of \$32,717.65, representing an income tax deficiency for the year 1943 in the amount of \$28,142.33 and interest thereon in the amount of \$4,575.32, which amounts were paid by plaintiff to the defendant as follows:

\$27,779.18 on November 25, 1946;

\$4,938.48 on June 5, 1947.

IV.

For answer to the allegations contained in paragraph IV of the complaint, defendant admits that on December 28, 1949, plaintiff filed a claim for refund of \$32,717.65, representing the amount paid to the defendant on account of the deficiency in income tax for the year 1943 in the amount of \$27,779.18 and interest thereon in the amount of \$4,938.48, but defendant denies that said deficiency in income tax and interest thereon were illegally assessed by the Commissioner of Internal Revenue and/or illegally collected by the defendant from plaintiff. Further answering the allegations contained in paragraph IV of the complaint, defendant admits that Exhibit A annexed thereto is a true

copy of the claim for refund referred to therein, but defendant denies each and every allegation of fact contained in said claim for refund not hereinbefore specifically admitted or denied, and defendant admits that on November 7, 1949, the Commissioner of Internal Revenue disallowed said claim for refund.

V.

Denies each and every allegation contained in paragraph V of the complaint.

VI.

Denies each and every allegation contained in the complaint not hereinbefore specifically admitted or denied.

Wherefore, the defendant prays that the complaint herein be dismissed and that the defendant be given judgment in his favor and against the plaintiff, together with costs and disbursements of this action.

/s/ FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed June 16, 1950.

In the United States District Court for the Northern District of California, Northern Division

Nos. 6257 and 6258—(Consolidated)

GEORGE FRENCH, JR.,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,

Defendant.

MARY E. FRENCH,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,

Defendant.

JUDGMENT ON SPECIAL VERDICT

The above causes came on regularly for trial on the 20th day of September, 1950, before the Honorable Dal M. Lemmon and a jury duly impaneled and sworn, Clyde M. Sherwood, Esq., appearing as counsel for plaintiffs and Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, and C. Elmer Collett, Assistant United States Attorney, appearing as counsel for defendant, and evidence both oral and documentary having been adduced and exhibits admitted, and the evidence being closed, the Court, under Rule 49 of the Federal Rules of Civil Procedure, determined

that the jury should be required to return only a special verdict in the form of a special written finding upon each issue of fact. Counsel for plaintiffs and defendant thereupon stipulated that the special verdict be returned in the form of answers to written interrogatories as hereinafter set forth in haec verba. Said cause, after argument by respective counsel, and instructions of the Court having been submitted to the jury for its consideration and special verdict, and the jury on the 21st day of September, 1950, having returned into court and having submitted its special verdict which was read by the Clerk and is as follows, to wit:

“Special Verdict

“During the period November 16, 1938, to May 31, 1943, was George French, Jr., a partner in the partnership of Oranges Bros. Construction Department or was he an employee of that partnership?

“Answer: Partner.

“Was eighty (80%) per cent of his compensation for the period November 16, 1938, to May 31, 1943, received or accrued during the year 1943?

“Answer: Yes.

“ARTHUR W. COLLINS,
“Foreman.”

And the Court having found as a conclusion of law that upon the special verdict plaintiffs are entitled to take nothing by their complaint herein and that judgment should be entered in favor of the defendant in each of said consolidated cases;

Now, therefore, by virtue of the law and by rea-

son of the premises as aforesaid, It Is Ordered, Adjudged and Decreed that plaintiffs recover nothing from defendant and that defendant have its costs of suit which are taxed at \$.....

Dated: October 4th, 1950.

/s/ DAL M. LEMMON,
United States District Judge.

Approved as to Form:

/s/ CLYDE C. SHERWOOD,
/s/ JOHN V. LEWIS,
Attorneys for Plaintiffs.

[Endorsed]: Filed October 4, 1950.

Entered October 5, 1950.

[Title of District Court and Causes.]

Civil Nos. 6257 and 6258

NOTICE OF MOTION FOR A NEW TRIAL

To Frank J. Hennessy, United States Attorney,
and C. Elmer Collett, Assistant United States
Attorney, attorneys for defendant:

Please take notice that in the Courtroom of the Honorable Dal M. Lemmon, in the Post Office Building, Sacramento, California, at ten o'clock a.m., on Monday, the 16th day of October, 1950, or as soon thereafter as counsel can be heard, plaintiffs, through their undersigned attorneys, will move the Court to set aside the special verdict of the jury

returned on the 21st day of September, 1950, and the judgment entered thereon on October 5, 1950, and to grant plaintiffs a new trial on the following grounds:

1. The verdict was contrary to law. George French, Jr., was not a partner in Oranges Bros. Construction Department as a matter of law.

2. The two special findings of the special verdict are inconsistent and do not support the judgment.

3. The evidence was insufficient to justify the verdict in that there was no substantial evidence to show that George French, Jr., was a partner in Oranges Bros. Construction Department;

(a) The evidence shows without contradiction that George French, Jr., did not participate in the control or management of Oranges Bros. Construction Department.

(b) The evidence shows without contradiction that George French, Jr., was not a co-owner of Oranges Bros. Construction Department and had no authority to make contracts on its behalf or obligate it.

(c) The evidence shows conclusively that George French, Jr., was not obligated to share in Oranges Bros. Construction Department losses, except as such losses might diminish the profits.

(d) There was no substantial evidence from which the jury could have found that George French, Jr., and the Oranges Brothers intended to create a partnership relationship or intended to carry on business as partners.

(e) In the absence of some evidence to the contrary, it must be presumed that the applications for a contractor's license and the income tax and social security returns of Oranges Bros. Construction Department were legally and properly prepared and filed.

This motion is based upon the pleadings, the oral and documentary evidence introduced at the trial, and all of the records and proceedings in these actions.

Dated: San Francisco, California, October 9, 1950.

SHERWOOD & LEWIS,

By /s/ CLYDE C. SHERWOOD,
Attorneys for Plaintiffs.

Service of copy acknowledged.

[Endorsed]: Filed October 10, 1950.

[Title of District Court and Cause.]

Nos. 6257 and 6258

ORDER

Plaintiffs' motion for a new trial is granted.

Dated: November 22nd, 1950.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed November 22, 1950.

[Title of District Court and Causes.]

Nos. 6257 and 6258

MOTION FOR LEAVE TO FILE AMENDED
COMPLAINT AND TO JOIN HAROLD A.
BERLINER AS A PARTY DEFENDANT

To Frank J. Hennessy, United States Attorney, and
Macklin Fleming, Assistant United States At-
torney, Attorneys for Defendant James G.
Smyth:

Please Take Notice that in the Courtroom of the
Honorable Dal M. Lemmon in the Post Office
Building, Sacramento, California, at 10:00 o'clock
a.m. on Monday, the 5th day of February, 1951, or
as soon thereafter as counsel can be heard, plain-
tiff, through his undersigned attorneys, will move
the Court for leave to file an amended complaint
in the above-entitled action, and for an order join-
ing Harold A. Berliner (former Collector of In-
ternal Revenue) as a party defendant. A copy of
the proposed amended complaint is attached hereto
and made a part hereof.

Said motions will be based upon:

- A. The said proposed amended complaint;
- B. The affidavit of Frank C. Scott attached
hereto;
- C. Plaintiff's memorandum of points and
authorities attached hereto; and
- D. All of the pleadings, files and records in
this proceeding.

Dated: San Francisco, California, January 25th,
1951.

SHERWOOD & LEWIS,

By /s/ CLYDE C. SHERWOOD,
Attorneys for Plaintiff.

Service and receipt of copy acknowledged.

[Title of District Court and Causes.]

Nos. 6257 and 6258

AFFIDAVIT OF FRANK C. SCOTT IN SUP-
PORT OF PLAINTIFF'S MOTION FOR
LEAVE TO FILE AN AMENDED COM-
PLAINT

State of California,
County of San Joaquin—ss.

Frank C. Scott, being first duly sworn, deposes
and says:

That he is a Certified Public Accountant duly
licensed to practice as such in the State of Cali-
fornia. That in the year 1944 he had his principal
office for the practice of his profession in the City
of Stockton, County of San Joaquin, State of Cali-
fornia. That in the course of his duties as a profes-
sional tax consultant and advisor affiant prepared
George French, Jr.'s, income tax and victory tax
return for the calendar year 1943. That affiant com-
puted the tax on the income that George French,
Jr., received from Orange Brothers Construction

Department in the year 1943 in accordance with the provisions of Sec. 107(a) of the Internal Revenue Code. That at the time the said income and victory tax return was prepared the Bureau of Internal Revenue had ruled (Reg. Sec. 36.6(b) T.D. 5300; 1943 CB 43) that taxpayers taking advantage of the relief provisions of Section 107(a) I.R.C. were not entitled to the benefits of Section 6 of the Current Tax Payment Act. In other words, the position of the Bureau of Internal Revenue at that time was that the taxpayer was not entitled to claim forgiveness of 75% of the tax on the income allocated to the year 1942 under the provisions of Section 107(a). That the sole reason why such forgiveness was not claimed in Schedule M of the said 1943 return was the said regulation of the Bureau of Internal Revenue. That affiant also prepared George French, Jr.'s claim for refund, a copy of which is attached to the original complaint on file herein. That the said refund claim fully apprised the Commissioner of Internal Revenue of all relevant facts and of the taxpayer's contention that he was entitled to have his 1943 income allocated in accordance with the provisions of 107(a) I.R.C. That the taxpayer's said 1943 income and victory tax return and the said refund claim contain all of the information necessary for the correct computation of the taxpayer's correct income and victory tax liability for the year 1943. The application of Section 107(a) is a mere matter of mathematical computation, to wit, reducing the income attributable to the year

1942 as shown on taxpayer's 1943 return and on said refund claim by 75%.

/s/ FRANK C. SCOTT.

Subscribed and sworn to before me this 25th day of January, 1951.

[Seal] /s/ MARGARET E. JARDINE,
Notary Public in and for the County of San
Joaquin, State of California.

[Endorsed]: Filed January 30, 1951.

[Title of District Court and Causes.]

Nos. 6257 and 6258

ORDER

Plaintiffs' motions for leave to file amended complaint in each of the above actions are granted without prejudice to defendant's right at the trial to raise the question as to whether the claim as filed supports the recovery sought by the amended complaint over that sought by the original complaint.

The motions in each action to join Harold A. Berliner as a party defendant are granted.

Defendant's motions in each action to reconsider order granting a new trial and to reinstate verdict are denied.

Dated: December 13th, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed December 13, 1951.

[Title of District Court and Cause.]

No. 6257

AMENDED COMPLAINT FOR REFUND OF
INCOME TAXES ILLEGALLY COL-
LECTED

Now comes the above-named plaintiff and complains of the above-named defendants and for cause of action alleges as follows:

I.

That defendant, James G. Smyth, is a resident of the City and County of San Francisco, State of California; that defendant James G. Smyth is now and at all times subsequent to the 14th day of May, 1945, has been the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that defendant Harold A. Berliner is a resident of the City and County of San Francisco, State of California; that defendant Harold A. Berliner was at all times relevant herein prior to April 1, 1945, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that the Court has jurisdiction over this matter under the provisions of Title 28, Sec. 1340, United States Code.

II.

That said plaintiff is now and at all times herein mentioned, has been a citizen of the United States of America, and a resident of the City of Stockton,

County of San Joaquin, State of California, and within the said Northern District of California. That at all times material to this proceeding, plaintiff was married and his wife's name is Mary E. French. That during all such times all income received by plaintiff was community income and was reported by plaintiff and his said wife on a community basis, each filing a separate income tax return for the year 1943, and all prior years herein mentioned. That within the time allowed by law therefor, plaintiff and his said wife have caused to be prepared, executed and filed with said defendant, their respective income tax returns for the year 1943; that at all times herein mentioned plaintiff kept his books of account and filed his income tax returns on the calendar year basis and on the cash basis of accounting.

III.

That at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carrying on a general contracting business at Stockton, California; that at all said times plaintiff was employed as superintendent of construction by said Oranges Brothers Construction Department. That such employment was on a fixed salary and commission basis under an agreement of employment whereby plaintiff was to receive a fixed salary of \$150.00 per month, and also was entitled to receive one-half ($\frac{1}{2}$) of the net profits of said construction and contracting business. That plaintiff received for his personal services, under said contract of employment, a total com-

pensation of \$429,196.69, of which 4.85 per cent, or \$20,827.87, was received prior to January 1, 1943, and 95.15 per cent, or \$408,368.82, was received during the taxable year 1943, to wit:

The sum of \$75,062.50 on February 8, 1943; and \$333,306.32 after May 31, 1943.

That plaintiff in filing his income tax returns for the year 1943 attempted to compute his tax on said two payments received in 1943 in accordance with the provisions of Internal Revenue Code, Sec. 107 (a), allocating each payment over the period of service preceding the receipt of such payment, which comprised 51 and 55 months, respectively. That said income and victory tax return erroneously reported a total income and victory tax liability for the taxable year of 1943 in the sum of \$69,150.12. That in making such computation plaintiff inadvertently and mistakenly omitted to claim forgiveness of 75% of his 1942 income tax liability in accordance with Sec. 6 of the Current Tax Payment Act. That plaintiff's correct total income and victory tax liability for the taxable year of 1943 on all incomes received from his employment by Oranges Brothers Construction Department and from other sources amounted to \$49,538.92. That plaintiff paid to Harold A. Berliner, who was then Collector of Internal Revenue for the First Collection District of California, with his principal office at San Francisco, California, the tax of \$69,150.12 shown on his said income tax return as follows:

July 15, 1943, paid on 1942 return . . .	\$29,451.94
September 15, 1943, paid on 1943 declaration of estimated tax	26,219.78
December 15, 1943, paid on amended 1943 declaration of estimated tax . .	13,701.94
1943 payment by employer of amount withheld from compensation	11,521.56
<hr/>	
Total	\$80,895.22
Less overpayment refunded	11,745.10
Net liability per the 1943 return.	\$69,150.12

That the Commissioner of Internal Revenue erroneously assessed a total income and victory tax liability for the said year 1943 in the amount of \$97,293.22 and erroneously assessed a deficiency of \$32,718.59 consisting of taxes in the amount of \$28,-143.10 and interest in the amount of \$4,575.49. That said erroneously assessed deficiency in the amount of \$32,718.59 was paid in full by the plaintiff to the defendant James G. Smyth, who was then Collector of Internal Revenue for the First Collection District of California, on the following dates, to wit:

\$27,779.18 on November 26, 1946; and
\$4,939.41 on June 5, 1947.

IV.

That on the 28th day of December, 1948, and within the time allowed under the provisions of I.R.C. Sec. 322 (b) (3), plaintiff caused to be prepared, executed and filed a claim for the refund of the taxes and interest illegally assessed by the Commissioner of Internal Revenue and illegally and

erroneously collected by the defendant on the dates above set forth. That a copy of said refund claim, marked "Exhibit A," is annexed to the original complaint on file herein and is incorporated hereto with the same force and effect as if here set forth in haec verba. That said refund claim was disallowed by the Commissioner of Internal Revenue by notice dated November 7, 1949, under Symbol No. IT:CL:CC:Rej.

V.

That plaintiff has overpaid his income and victory tax for the year 1943 by the amount of \$52,329.79. That no part of said sum ever was or is legally owing or paid to the said defendant as and for an income tax of plaintiff for the calendar year 1943 or for any period, or otherwise, or at all. That no part of said sum has been repaid or scheduled for refund to plaintiff and the whole thereof, together with interest thereon from the time it was paid to the defendant, is now due, owing and unpaid from defendant unto plaintiff.

Wherefore, Plaintiff prays for judgment in his favor and against the defendant Harold A. Berliner in the sum of \$19,611.20, together with interest on said sum from the respective dates upon which it was paid to the said defendant pursuant to the provisions of I.R.C. Sec. 3771, and plaintiff prays for judgment in his favor and against the defendant James G. Smyth in the sum of \$32,718.59, together with interest on said sum from the respective dates of payments pursuant to the provisions of I.R.C.

Sec. 3771, and for such other and further relief as the Court may find meet and just in the premises.

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed December 20, 1951.

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR REFUND
OF INCOME TAXES ILLEGALLY COL-
LECTED

Now comes the above-named plaintiff and complains of the above-named defendants and for cause of action alleges as follows:

I.

That defendant James G. Smyth is a resident of the City and County of San Francisco, State of California; that defendant James G. Smyth is now and at all times subsequent to the 14th day of May, 1945, has been the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that defendant Harold A. Berliner is a resident of the City and County of San Francisco, State of California; that defendant Harold A. Berliner was at all times relevant herein

prior to April 1, 1945, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that the Court has jurisdiction over this matter under the provisions of Title 28, Sec. 1340, United States Code.

II.

That said plaintiff is now, and at all times herein mentioned has been, a citizen of the United States of America and a resident of the City of Stockton, County of San Joaquin, State of California, and within the said Northern District of California. That at all times material to this proceeding, plaintiff was married, and her husband's name is George French, Jr.; that during all such times all income of plaintiff was derived from community income which was reported by plaintiff and her husband on a community basis, each filing a separate income tax return for the year 1943, and all prior years herein mentioned. That within the time allowed by law therefor plaintiff and her said husband have caused to be prepared, executed and filed with said defendant their respective income tax returns for the year 1943; that at all times herein mentioned plaintiff kept her books of account and filed her income tax returns on the calendar year basis and on the cash basis of accounting.

III.

That at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carrying

on a general contracting business at Stockton, California; that at all times plaintiff's husband was employed as superintendent of construction by said Oranges Brothers Construction Department. That such employment was on a fixed salary and commission basis under an agreement of employment whereby plaintiff's husband was to receive a fixed salary of \$150.00 per month, and also was entitled to receive one-half of the net profits of said construction and contracting business. That plaintiff's husband received for his personal services under said contract of employment a total compensation of \$429,196.69, of which 4.85 per cent, or \$20,827.87, was received prior to January, 1943, and 95.15 per cent, or \$408,368.82, was received during the taxable year 1943, to wit:

The sum of \$75,062.50 on February 8, 1943; and \$333,306.32 after May 31, 1943.

That plaintiff in filing her income tax return for the year 1943 attempted to compute her tax on her community share of said two payments received in 1943 in accordance with the provisions of Internal Revenue Code Section 107(a), allocating each payment over the period and services preceding the receipt of such payment by her husband, which comprised 51 and 55 months, respectively. That said income and victory tax return erroneously reported a total income and victory tax liability for the taxable year of 1943 in the sum of \$69,149.54. That in making such computation plaintiff inadvertently and mistakenly omitted

to claim forgiveness of 75% of her 1942 income tax liability in accordance with Sec. 6 of the Current Tax Payment Act. That plaintiff's correct total income and victory tax liability for the taxable year of 1943 on all incomes received from her husband's employment by Oranges Brothers Construction Department and from other sources amounted to \$49,538.33. That plaintiff paid to Harold A. Berliner, who was then Collector of Internal Revenue for the First Collection District of California with his principal office at San Francisco, California, the tax of \$69,149.54 shown on her said income tax return as follows:

July 15, 1943, paid on 1942 return . . .	\$29,569.95
September 15, 1943, paid on 1943 declaration of estimated tax	26,160.78
December 15, 1943, paid on amended 1943 declaration of estimated tax . .	13,406.13
1943 payment by husband's employer of amount withheld from compen- sation	11,521.56
	<hr/>
Total	\$80,658.42
Less overpayment refunded	11,508.88
Net liability per the 1943 return.	\$69,149.54

That the Commissioner of Internal Revenue erroneously assessed a total income and victory tax liability for the said year 1943 in the amount of \$97,291.87 and erroneously assessed a deficiency of \$32,717.65 consisting of taxes in the amount of \$28,-

142.33 and interest in the amount of \$4,575.32. That said erroneously assessed deficiency in the amount of \$32,717.65 was paid in full by the plaintiff to the defendant James G. Smyth, who was then Collector of Internal Revenue for the First Collection District of California on the following dates, to wit:

\$27,779.18 on November 26, 1946; and
\$4,938.47 on June 5, 1947.

IV.

That on the 28th day of December, 1948, and within the time allowed under the provisions of I.R.C. Sec. 322(b)(3), plaintiff caused to be prepared, executed and filed a claim for the refund of the taxes and interest illegally assessed by the Commissioner of Internal Revenue and illegally and erroneously collected by the defendant on the dates above set forth. That a copy of said refund claim, marked "Exhibit A," is annexed to the original complaint on file herein and is incorporated hereto with the same force and effect as if here set forth in haec verba. That said refund claim was disallowed by the Commissioner of Internal Revenue by notice dated November 7, 1949, under Symbol No. IT:CL:CC:Rej.

V.

That plaintiff has overpaid her income and victory tax for the year 1943 by the amount of \$52,-328.86. That no part of said sum ever was or is legally owing or paid to the said defendant as and for an income tax of plaintiff for the calendar year 1943 or for any period, or otherwise, or at all. That

no part of said sum has been repaid or scheduled for refund to plaintiff and the whole thereof, together with interest thereon from the time it was paid to the defendant, is now due, owing and unpaid from defendant unto plaintiff.

Wherefore, plaintiff prays for judgment in her favor and against the defendant Harold A. Berliner in the sum of \$19,611.21 together with interest on said sum from the respective dates upon which it was paid to the said defendant pursuant to the provisions of I.R.C. Sec. 3771, and plaintiff prays for judgment in her favor and against the defendant James G. Smyth in the sum of \$32,717.65 together with interest on said sum from the respective dates of payments, pursuant to the provisions of I.R.C. Sec. 3771, and for such other and further relief as the Court may find meet and just in the premises.

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed December 20, 1951.

[Title of District Court and Cause.]

No. 6257

ANSWER TO AMENDED COMPLAINT

The defendants, James G. Smyth, Collector of Internal Revenue for the First Collection District

of California, and Harold A. Berliner, former Collector of Internal Revenue for said Collection District of California, by their Attorney Chauncey Tramutolo, United States Attorney for the Northern District of California, for answer to the amended complaints herein make the following statements:

I.

Admit the allegations contained in paragraph I of said amended complaint, except that defendants deny that this court has jurisdiction over the matters contained in said amended complaint under the Provisions of Title 28, Section 1340, U. S. Code.

II.

Deny the allegations contained in paragraph II of said amended complaint, except that defendants admit that plaintiff was a citizen of the United States and a resident of the City of Stockton, County of San Joaquin, State of California, and within the Northern District of California; that at all times material to this proceeding he was married and his wife's name was Mary E. French, and that plaintiff and his wife each filed a separate federal income tax return for the calendar year 1943.

III.

Deny the allegations contained in paragraph III of said amended complaint, except that defendants admit that all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carry-

ing on a general contracting business at Stockton, California; that at all said times plaintiff was superintendent of construction of said Oranges Brothers Construction Department, and was entitled to receive one-half of the net profits of said construction and contracting business; that plaintiff computed his income tax for the calendar year 1943 on his federal income tax return for that year in accordance with the Provisions of Section 107 (a) of the Internal Revenue Code, but defendants deny that plaintiff was entitled to compute his federal income tax for that year under that Section of the Internal Revenue Code.

Further answering the allegations contained in paragraph III of said amended complaint, defendants admit that plaintiff paid to Harold A. Berliner, when he was former collector of Internal Revenue for the First Collection District of California, the net tax of \$69,150.12 on the dates and in the amounts as shown on lines 22 to 28 on page 3 of said amended complaint.

IV.

Deny the allegations contained in paragraph IV of said amended complaint, except that defendants admit that exhibit "A" annexed to plaintiff's original complaint in this action is a true copy of a claim for refund filed by him with the Collector of Internal Revenue for the First Collection District of California on December 28, 1948, and that by registered notice dispatched to plaintiff on November 7, 1949, he was notified that said claim for re-

fund had been disallowed in its entirety by the Commissioner of Internal Revenue, but defendants deny each and every allegation contained in said claim for refund not herein specifically admitted or denied.

V.

Deny each and every allegation contained in paragraph V of said amended complaint.

Wherefore defendants pray that the said amended complaint herein be dismissed and that defendants be given judgment in their favor and against the plaintiff, together with costs and disbursements of this action.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ THOMAS W. MARTIN,
Assistant U. S. Attorney.

[Endorsed]: Filed February 21, 1952.

[Title of District Court and Cause.]

No. 6258

ANSWER TO AMENDED COMPLAINT

The defendants, James G. Smyth, Collector of Internal Revenue for the First Collection District of Northern California, and Harold A. Berliner, former Collector of Internal Revenue for said collection district, by their attorney, Chauncey Tramutolo, United States Attorney for the Northern Dis-

trict of California, for answer to the amended complaints herein make the following statements:

I.

Admit the allegations contained in paragraph I of said amended complaint, except that defendants deny that this court has jurisdiction over the matters contained in this amended complaint under the Provisions of Title 28, Section 1340, U. S. Code.

II.

Deny the allegations contained in paragraph II of said amended complaint, except that defendants admit that plaintiff is a citizen of the United States of America and a resident of the City of Stockton, County of San Joaquin, State of California, and within the Northern District of California; that at all times material to this proceeding she was married and her husband's name is George French, Jr., and that plaintiff and her husband each filed separate federal income tax returns for the calendar year 1943.

III.

Deny the allegations contained in paragraph III of said amended complaint, except that defendants admit that at all times during the period from November 15, 1938, to May 31, 1943, Oranges Brothers Construction Department was a partnership carrying on a general contracting business at Stockton, California, and at all said times plaintiff's husband was superintendent of construction of said Oranges Brothers Construction Department; that he was

entitled to receive one-half of the net profits of the said construction and contracting business; that plaintiff computed her federal income tax for the calendar year 1943 on the community basis and in accordance with the Provisions of Section 107 (a) of the Internal Revenue Code, but the defendants deny that plaintiff was entitled to compute her federal income tax under that section of the Internal Revenue Code. Further answering the allegations contained in paragraph III of said complaint, defendants admit that plaintiff paid to Harold A. Berliner, when he was former Collector of Internal Revenue for the First Collection District of California, the net tax of \$69,149.54 on the dates and in the amounts as shown on lines 24 to 30 on page 3 of said amended complaint.

IV.

Deny the allegations contained in paragraph IV of said amended complaint, except that defendants admit that exhibit "A" annexed to plaintiff's original complaint in this action is a true copy of a claim for refund filed by plaintiff with the Collector of Internal Revenue for the First Collection District of California on December 28, 1948, and that by registered notice dispatched to plaintiff on November 7, 1949, she was notified that said claim for refund had been disallowed in its entirety by the Commissioner of Internal Revenue, but defendants deny each and every allegation contained in said claim for refund not herein specifically admitted or denied.

V.

Deny each and every allegation contained in paragraph 5 of said amended complaint.

Wherefore defendants pray that the amended complaint herein be dismissed and that they be given judgment in their favor and against the plaintiff, together with the costs and disbursements of this action.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

/s/ THOMAS W. MARTIN,
Assistant U. S. Attorney.

[Endorsed]: Filed February 21, 1952.

[Title of District Court and Causes.]

Nos. 6257 and 6258

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel of record as follows:

1. That all of the files, pleadings, motions and supporting papers in the above-entitled actions, and all of the evidence, oral and documentary introduced at the trial of said actions on September 20th and 21st, 1950, and stipulations of counsel appearing in the transcripts of said trials, together with the documents hereinafter enumerated, true copies of which are attached hereto and made a part

hereof, shall constitute the entire evidence and record upon which the above-entitled actions are submitted for decision:

a. Oranges Brothers Construction Department Summary of Gross Income November 15, 1938, to May 31, 1943, marked Defendants' Exhibit "E";

b. Original partnership return, Oranges Brothers Construction Department for the calendar year 1942, marked Defendants' Exhibit "F";

c. Amended partnership return, Oranges Brothers Construction Department for the calendar year 1942 marked Defendants' Exhibit "G";

d. Partnership return, Oranges Brothers Construction Department for the calendar year 1943 marked Defendants' Exhibit "H";

e. Original individual income tax return of George French, Jr., for the calendar year 1942, marked Defendants' Exhibit "I";

f. Amended individual income tax return of George French, Jr., for the calendar year 1942, marked Defendants' Exhibit "J";

g. Original individual income tax return of Mary E. French for the calendar year 1942 marked defendants' Exhibit "K";

h. Amended individual income tax return of Mary E. French for the calendar year 1942 marked Defendants' Exhibit "L";

2. That the Reporter's Transcript, Volumes 1 and 2, included in the record under paragraph 1 above, is subject to correction for a number of typographical errors; that an agreed list of such errors will be forwarded to the Court Reporter, to be appended to the official Transcript on file in the above-entitled actions.

3. That defendants, and each of them, are residents of the City and County of San Francisco, State of California; that defendant James G. Smyth was, at all times from May 15, 1945, to and including the date of this action, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that defendant Harold A. Berliner was, at all times material herein prior to April 1st, 1945, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California.

4. That at all times during the years 1938 through 1943, inclusive, plaintiffs were married, and all income received during such period by George French, Jr., was the community income of plaintiffs, and was properly reportable upon a community basis.

5. That in the event the Court shall find for the plaintiff George French, Jr., according to his amended complaint, judgment shall be entered against defendant Harold Berliner for \$19,726.79 with interest from March 15, 1944, and judgment shall be entered against defendant James G. Smyth

for \$32,718.59, with interest on \$27,779.18 from November 26, 1946, and with interest on \$4,939.41 from June 5, 1947. In the alternative event, that the Court shall find for the plaintiff George French, Jr., according to the allegations of the original complaint against the defendant James G. Smyth only, judgment shall be entered against defendant James G. Smyth in the amount and manner shown above.

6. That in the event the Court shall find for the plaintiff, Mary E. French according to her amended complaint, judgment shall be entered against defendant Harold A. Berliner for \$19,490.80, with interest from March 15, 1944, and judgment shall be entered against defendant James G. Smyth for \$32,717.65 with interest on \$27,779.18 from November 26, 1946, and with interest on \$4,938.47 from June 5, 1947. In the alternative event that the Court shall find for the plaintiff Mary E. French according to the allegations of the original complaint against the defendant James G. Smyth only, judgment shall be entered against defendant James G. Smyth for \$32,578.28 with interest on \$27,639.81 from November 26, 1946, and with interest on \$4,938.47 from June 5, 1947.

7. That plaintiffs herein, respectively, made the following payments and total net payments to Harold A. Berliner, as Collector of Internal Revenue for the First Collection District of California, upon the dates, and in the amounts hereinafter indicated:

George French, Jr.

Date of Payment	Amount
7-15-43	\$29,451.94
9-15-43	26,219.78
12-15-43	13,701.94
1943 payment by employer of amount withheld from compensation	11,521.56
Total	<u>\$80,895.22</u>
Less: overpayment refunded ...	11,745.10
Total net payment equal to net liability per 1943 return	<u><u>\$69,150.12</u></u>

Mary French

Date of Payment	Amount
7-15-43	\$29,569.95
9-15-43	26,160.78
12-15-43	13,406.13
1943 payment by husband's employer of amount withheld from compensation ..	11,521.56
Total	<u>\$80,658.42</u>
Less: overpayment refunded ...	11,508.88
Total net payment equal to net liability per 1943 return	<u><u>\$69,149.54</u></u>

No part of said total net payments has been refunded or scheduled for refund to plaintiffs, or either of them.

8. That plaintiffs made, respectively, the following payments on account of an asserted deficiency of income tax and interest to James G. Smyth as Collector of Internal Revenue for the

First Collection District of California, on the dates and in the amounts indicated below:

Date of Payment	George French, Jr.	Mary French
November 26, 1946 . . .	\$27,779.18	\$27,779.18
June 5, 1947	4,939.41	4,938.47
	<hr/>	<hr/>
Total payment	<u>\$32,718.59</u>	<u>\$32,717.65</u>

No part of said total payments has been refunded or scheduled for refund to plaintiffs, or either of them.

9. That George French, Jr., was Superintendent of Construction of Oranges Brothers Construction Department from November 15, 1938, to May 31, 1943.

11. That in the event judgment is rendered against the defendants, or either of them, such judgment shall include a certificate that there was probable and reasonable cause for the acts of defendants, or either of them, in demanding and collecting from plaintiffs, the income taxes for the refund of which, judgment will be entered.

Dated: July 24, 1952.

SHERWOOD & LEWIS,
By /s/ CLYDE C. SHERWOOD,
Attorneys for Plaintiffs.

CHAUNCEY TRAMUTOLO,
United States Attorney.

By /s/ CHARLES ELMER COLLETT,
Attorney for Defendants.

[Endorsed]: Filed July 28, 1952.

[Title of District Court and Causes.]

Nos. 6257 and 6258

MEMORANDUM OPINION

Taxation, our Supreme Court has said, is “a subject that is highly specialized and so complex as to be the despair of judges.”¹

The particular feature of tax law to be here considered is the effect of the taxpayers’ failure to assert, before the Collector of Internal Revenue, a ground for refund that they now seek to press before this Court. In their claims for refund, filed with the Collector, the taxpayers neglected to invoke the “forgiveness” feature of the Current Tax Payment Act of 1943.

To err is human, to forgive divine, runs the ancient adage. In the present suit, however, it will be found that because the taxpayers “erred” in their respective refund claims, they cannot be “forgiven” part of their taxes.

1. Statement of the Case.

This cause, on the original complaints, was tried before a jury on September 20 and 21, 1950. The result was a special verdict and a judgment thereon in favor of the defendant Smyth. The plaintiffs’ motion for a new trial was granted by this Court on November 22, 1950.

The plaintiffs thereafter filed a motion for leave

¹*Dobson v. Commissioner*, 320 U.S. 489, 498 (1943).

to file amended complaints and to join as a party defendant Harold A. Berliner, former Collector of Internal Revenue for the First Collection District of California. The defendant Smyth filed a motion for this Court to reconsider its order granting a new trial and to reinstate the jury's verdict. By order entered December 13, 1951, this Court denied the motion of defendant Smyth, and granted the plaintiff's motion for leave to file amended complaints and to join Berliner as a party defendant.

In their brief, the plaintiffs assert that "The purpose of the amended complaints was to secure recovery of overpayments of income taxes for the year 1943 made by plaintiffs to * * * Berliner which overpayments are alleged to be based upon the same ground as the overpayments to defendant * * * Smyth, to wit: the denial to plaintiffs of the relief provided in Section 107(a)."

The amended complaint of the plaintiff George French, Jr., however, contains the following allegations that do not appear in his original complaint:²

"(The) plaintiff in filing his income tax returns for the year 1943 attempted to compute his tax on said two payments (for personal services rendered to the Oranges Bros. Construction Co., Ex. I) received in 1943 in accordance with the provisions of the Internal Revenue Code Sec. 107(a), allocating each payment over the period of service preceding the receipt of such payment which comprised 51 and 55

²Mutatis mutandis, the same is true as to the amended complaint of the plaintiff Mary E. French.

months, respectively. That said income and victory tax return erroneously reported a total income and victory tax liability for the taxable year of 1943 in the sum of \$69,150.12. That in making such computation plaintiff inadvertently and mistakenly omitted to claim forgiveness of 75 per cent of his 1942 income tax liability in accordance with section 6 of the Current Tax Payment Act. That plaintiff's correct total income and victory tax liability for the taxable year of 1943 on all incomes received from his employment by Oranges Brothers Construction Department and from other sources amounted to \$49,538.92. That plaintiff paid to Harold A. Berliner, who was then Collector of Internal Revenue for the First Collection District * * * the tax of \$69,150.12 shown on his said income tax return," etc.

The parties have stipulated that these cases are submitted to the Court without a jury for decision upon the evidence introduced at the trial of the actions on September 20 and 21, 1950, together with certain specified documents.

2. Questions Presented.

The first question presented is whether the plaintiffs are entitled to compute their respective income tax liabilities for the calendar year 1943 in accordance with the relief provisions of Section 107(a) of 26 USCA. At the previous trial of these actions, the defendants contended that the plaintiff George

French, Jr., was a co-partner or a co-adventurer rather than an employee of Oranges Bros. Construction Department. This Court adheres to its previous ruling that French was an employee of the construction company, and that therefore both plaintiffs are entitled to avail themselves of the relief provisions of Section 107(a).

The second question is concerned with whether the plaintiffs are entitled to avail themselves, as against the defendant Berliner, of the "forgiveness" provisions of Section 6 of the Current Tax Payment Act of 1943, 26 USCA, Internal Revenue Acts, pages 406-411. The defendants contend that the plaintiffs are not entitled to a judgment against the defendant Berliner since the claims for refund did not include the liability now asserted against him.

3. The Applicable Statute and Regulations.

The applicable statute relating to suits for tax refunds is 26 USCA section 3772, which reads in part as follows:

“(a) Limitations

“(1) Claim. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner,

according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.”

The administrative rules relating to “claims for refund by taxpayers” are to be found in the Code of Federal Regulations, 1943 Cumulative Supplement, Title 26, pages 6443-6444, as amended in 1944 Supplement, id., pages 1989-1990. Section 29.322-3 of that Code provides that “Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843,” and that:

“The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof * * * A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund.” (Emphasis supplied.)

4. The Sole Claims for Refund.

The claims for refund filed by the plaintiffs on December 28, 1948, contained the following allegations, again mutatis mutandis:

“* * * that the assessments of deficiencies on the said return for the calendar year 1943 were, with reference to the report and statement described above and incorporated herein by reference, based on the following errors:

“(1) The disallowance of the application of the provisions of section 107, Internal Revenue Code, in limitation of his income and victory

tax liability on compensation for services received in 1943 for services during and for a period of more than 36 months, as computed in his said return for 1943;

“(2) The computation of his income from services during the years 1942 and 1943 on the theory that, and as if he had been a member of a partnership, Oranges Brothers Construction Division; and

“(3) In the alternative to the assignments of error 1) and 2) above, the failure of the said report and statement (of the internal revenue agents) to allow in the computation of victory tax net income for the year 1943 a deduction for California income taxes on the amounts considered and treated in the said report and statement to be distributive income from the said partnership.”

The above constituted the only “assignments of error” contained in the plaintiffs’ claims for refund filed with the Collector. There is in those assignments not the slightest intimation, either of fact or of law, that the taxpayer was relying upon the “forgiveness” provisions of Section 6 of the Current Tax Payment Act of 1943.

5. Strict Compliance by the Taxpayer With Refund Statutes and Regulations Is Required.

For nearly a century, the Supreme Court has adhered to the rule that statutes authorizing refunds to taxpayers should be strictly construed in favor of the Government. Both the boundaries and

the rationale of this doctrine were lucidly stated in *Nicholl v. United States*, 74 U.S. 122, 126-127 (1869):

“The immunity of the United States from suit is one of the main elements to be considered in determining the merits of this controversy. Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person.

“It is not important for the purposes of this suit, to notice any of the Acts of Congress on the subject of payment of the duties on imports, anterior to the Act of Feb. 26, 1845, 5 Stat. at L. 727. This Act altered the rule previously in force, and required the party of whom duties were claimed, and who denied the right to claim them, to protest in writing with a specific statement of the grounds of objection.

“Through this law Congress said to the importing merchant, you must pay the duties assessed against you; but as you say they are

illegally assessed, if you file a written protest stating wherein the illegality consists, you can test the question of your liability to pay, in a suit against the collector, to be tried in due course of law and, if the courts decide in your favor, the treasury will repay you; but in no other way will the Government be responsible to refund.

“The written protest, signed by the party, with the definite grounds of objection, were conditions precedent to the right to sue, and if omitted, all right of action was gone. These conditions were necessary for the protection of the Government, as they informed the officers charged with the collection of the revenue from imports, of the merchants’ reasons for claiming exemption, and enabled the Treasury Department to judge of their soundness, and to decide on the risk of taking the duties in the face of the objections. There was no hardship in the case, because the law was notice equally to the collector and importer, and was a rule to guide their conduct, in case differences should arise in relation to the laws for the imposition of duties. The allowing a suit at all, was an act of beneficence on the part of the Government. As it had confided to the Secretary of the Treasury the power of deciding in the first instance on the amount of duties demandable on any specific importation, so it could have made him the final arbiter in all disputes concerning the same.” (Emphasis supplied.)

Coming down to more recent years, we find the foregoing doctrine explicitly and emphatically applied by the Supreme Court in an income tax case. In *United States v. Felt & Tarrant Co.*, 283 U.S. 269, 270, 272-273 (1931), it was "conceded that respondent was entitled to a deduction from gross income * * *, which, if allowed, would result in the refund demanded." "The sole objection urged by the Government" was "that the claim for refund filed by petitioner as a prerequisite to suit did not comply" with a statute identical in all material respects with Section 3772 (a)(1), *supra*, and with a Treasury Regulation that was not so exacting as Section 29.322-3, *supra*.

With such a situation before him, Mr. Justice (later Chief Justice) Stone said:

"The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant, whether the collector or the United States. (Cases cited.)

"One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue, (case cited), a purpose not accomplished with respect to the present demand by the bare declaration in respondent's claim that it was filed 'to protect all possible legal rights of the taxpayer.' The claim for refund, which Section 1318 makes prerequisite to suit, obviously relates to

the claim which may be asserted by the suit. Hence, quite apart from the provisions of the Regulation, the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded.

“* * * But in *Tucker v. Alexander* (infra) the right of the Government to insist upon compliance with the statutory requirement was emphasized.* * *

“The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim, which the statute contemplates, is not a ground for suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and ‘they mark the conditions of the claimant’s right.’ (Case cited.)” (Emphasis supplied.)

In *Maas & Waldstein Co. v. United States*, 283 U.S. 583, 588, 589 (1931), the Court said:

“The general purpose of the petitioner’s communications to the Commissioner was to induce the latter to set on foot an investigation of the Company’s affairs to the end that, after ascertaining the circumstances and in the exercise of a proper discretion, he might make

an assessment duly proportioned to those imposed upon others engaged in like business. There was no challenge of the Commissioner's right then to demand payment according to the general rule—no claim that in view of the facts then before him this would amount to an unlawful imposition.

* * *

“We are unable to conclude that the petitioner's action amounted to a precise objection to an unauthorized exaction within the fair intentment of the statute. Meticulous compliance by the taxpayer with the prescribed conditions must appear before he can recover. (Case cited.)” (Emphasis supplied.)

In *Vica Co. v. Commissioner*, 9 Cir., 159 F. 2d 148, 150 (1947), certiorari denied, 331 U.S. 833 (1947), the late Senior Judge Garrecht said:

“A necessary part of a proper claim for refund is an adequate statement of the contention of the taxpayer of the extent to which the taxpayer bore the burden of the processing tax, together with a statement of facts in support of that contention.”

Again, in *Rogan v. Ferry*, 9 Cir., 154 F. 2d 974, 976 (1946), our Court of Appeals thus expressed the rule:

“It is of course the law that a suit for refund of taxes must be based on a claim previously filed with the Commissioner, and that the claim

must set forth in detail each ground on which a refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." (Emphasis supplied.)³

In their briefs, the plaintiffs concede that "compliance with the requirements prescribed by the Regulations in regard to the filing of refund claims is a condition to the plaintiffs' right to maintain a suit for the recovery of taxes," and that "The Commissioner is entitled to be informed of the precise ground or grounds upon which recovery is sought so that he may properly direct his investigation of the sufficiency of the facts." The foregoing concessions are not over-generous on the plaintiffs' part, since they understate, if anything, the Supreme Court's exaction that "Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right.' "

Yet at the close of their reply brief, the plaintiffs assert that "even if any doubt existed as to the

³See also *Cheatham v. Norvekl*, 92 U.S. 85, 88-89 (1876); *Taylor v. Secor*, 92 U.S. 575, 613-614 (1876); *Snyder v. Marks*, 109 U.S. 189, 193-194 (1883); *Arnson v. Murphy*, 115 U.S. 579, 584-586 (1885); *Kings County Savings Institution v. Blair*, 116 U.S. 200, 206 (1886); *Auffmordt v. Hedden*, 137 U.S. 310, 324 (1890); *Rand v. United States*, 249 U.S. 503, 507-510 (1919); *Graham v. du Pont*, 262 U.S. 234, 254-255 (1923); *Tucker v. Alexander*, 275 U.S. 228, 231 (1927); *Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 296, 297-299 (1945); *Harvey v. Early*, 4 Cir., 160 F. 2d 836, 838 (1947); *Cherokee Textile Mills v. Commissioner*, 6 Cir., 160 F. 2d 685, 688 (1947).

sufficiency of the refund claims, it should be resolved in favor of the plaintiffs." Not only is this parting statement intrinsically erroneous, but it conflicts with the plaintiffs' earlier concessions to which reference has just been made. Inconsistency in argument usually indicates the weakness of a suitor's position.

6. The Taxpayer Cannot Urge Before the Court Any Grounds That Were Not Specified in His Claim for a Refund Filed With the Collector.

As a corollary of the rule just discussed, it is well settled that the complaining taxpayer is not permitted—absent an amended claim or a waiver by the Government—to urge before the Court any grounds for a refund not presented in his original claim filed with the Bureau of Internal Revenue.

In *Real Estate-Land Title & Trust Co. v. United States*, 309 U.S. 13, 17-18, the petitioner contended that it had abandoned a certain plant and hence was entitled to a deduction for "losses sustained during the taxable year and not compensated for by insurance or otherwise."

Of such a contention, the Court said:

"Whether petitioner has satisfied those requirements we do not decide, for its claim for refund was based exclusively and solely on the ground that it was entitled to an allowance for obsolescence. Hence, in absence of a waiver by the government, *Tucker v. Alexander* * * * (*supra*), or a proper amendment, petitioner is precluded in this suit from resting its claim on another ground. (Case cited.)"

In *Nemours Corporation v. United States*, 3 Cir., 188 F. 2d 745, 750 (1951), certiorari denied, 342 U.S. 834 (1951), the Court thus expounded the doctrine:

“The taxpayer stated as its ground for refund Section 26(f) (of the Revenue Act of 1936) and made its computation accordingly. That does not, under the decisions, give him (sic) a right to claim under some other section. (Cases cited.)

“This is hard law, no doubt. Perhaps it is necessarily strict law in view of the scope of the operations of a fiscal system as large as that of the United States. Whether that is so we are not called upon to say. We apply the rule; we do not make it. It is to be observed that recovery of claims against the Government has always been the subject of a strict compliance requirement. The recovery of claims for tax refunds is but an application of this broad and strict rule.”

Throughout their briefs, the plaintiffs insist that their “error” was “merely” one of “computation” of the “amount” of the refund claimed. The short answer to this argument is that Professor Einstein himself, unless he had known of the existence of Section 6 of the Current Tax Payment Act of 1943, could not have “computed” the plaintiffs’ income tax returns so as to have invoked the “forgiveness” provisions of that statute!

7. Conclusion.

Accordingly, since the amended complaints assert against the defendant Berliner a "ground upon which a refund is claimed" that was not included in the claim filed with the Collector, the plaintiffs cannot recover any sum against the defendant Berliner.

On the other hand, since the Court finds that the plaintiff George French, Jr., was an employee rather than a co-partner or co-adventurer of Oranges Brothers Construction Department, both plaintiffs are entitled to avail themselves of the relief provisions of Section 107(a), as against the defendant Smyth.

Findings of fact and conclusions of law consistent with the foregoing are to be served and lodged by the plaintiffs.

Dated: October 14th, 1952.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed October 14, 1952.

[Title of District Court and Causes.]

Nos. 6257 and 6258

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

These suits are for the recovery of income taxes for the calendar year 1943, a portion of which were

collected by Collector James J. Smyth and a portion of which were collected by former Collector Harold A. Berliner. The original complaints were against the defendant James J. Smyth only and sought only to recover the amount paid to him with interest thereon as provided by law.

The cases were consolidated for trial and decision. The cause on the original complaint was tried before a jury on September 20th and 21st, 1950. The result was a special verdict and a judgment thereon in favor of the defendant Smyth. The plaintiffs' motion for a new trial was granted by this Court on November 22nd, 1950.

Plaintiffs thereafter filed a motion for leave to file amended complaints and to join as a party defendant Harold A. Berliner, the former Collector of Internal Revenue for the First Collection District of California. The defendant Smyth filed a motion for this Court to reconsider its order granting a new trial and to reinstate the jury's verdict. By order entered December 13, 1951, this Court denied the motion of defendant Smyth and granted the plaintiffs' motions for leave to file amended complaints and to join Berliner as a party defendant. The facts were stipulated in part and are found as stipulated. In addition, the parties have stipulated that these cases are submitted to the Court without a jury for decision upon the evidence introduced at the trial of the actions on September 20th and 21st, 1950, together with certain specified documents and stipulated facts.

The Court having accepted the stipulation and

having considered the evidence and the briefs of the parties, finds the facts and states the conclusions of law as follows:

Findings of Fact

1. This action is brought under 28 U. S. Code Section 1340 and Section 3772(a) (1) and (2) of the Internal Revenue Code for the recovery of income taxes alleged to have been illegally or erroneously assessed and collected.

2. That defendants, and each of them, are residents of the City and County of San Francisco, State of California; that defendant James G. Smyth was, at all times from May 15, 1945, to and including the date of this action, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California; that defendant Harold A. Berliner was, at all times material herein prior to April 1st, 1945, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California.

3. That plaintiffs are now, and at all times herein mentioned have been, citizens of the United States of America, and residents of the City of Stockton, County of San Joaquin, State of California within the said Northern District of California. That at all times during the years 1938 through 1943, inclusive, plaintiffs were married and all income received by plaintiff George French, Jr., was the community income of plaintiffs and was prop-

erly reportable upon a community basis. That within the time allowed by law therefor, plaintiffs caused to be prepared, executed and filed with the defendant Smyth, their respective income tax returns for the year 1943. That at all times herein mentioned plaintiffs herein kept their books of account and filed their income tax returns on the calendar year basis and on the cash receipts and disbursements method of accounting.

4. That plaintiffs herein, respectively, made the following payments and total net payments to Harold A. Berliner, as Collector of Internal Revenue for the First Collection District of California upon the dates, and in the amounts hereinafter indicated:

GEORGE FRENCH, JR.		MARY FRENCH	
Date of Payment	Amount	Date of Payment	Amount
7-15-43	\$29,451.94	7-15-43	\$29,569.95
9-15-43	26,219.78	9-15-43	26,160.78
12-15-43	13,701.94	12-15-43	13,406.13
1943 payment by employer of amount withheld from com- pensation	11,521.56	1943 payment by husband's employer of amount withheld from compensation..	11,521.56
<hr/>		<hr/>	
Total	\$80,895.22	Total	\$80,658.42
LESS: overpayment refunded	11,745.10	LESS: overpayment refunded	11,508.88
<hr/>		<hr/>	
Total net payment equal to net liabil- ity per 1943 return..	<u>\$69,150.12</u>	Total net payment equal to net liabil- ity per 1943 return..	<u>\$69,149.54</u>

No part of said total net payments has been refunded or scheduled for refund to plaintiffs, or either of them.

5. That plaintiffs made, respectively, the following payments on account of an asserted deficiency of income tax and interest to James G. Smyth as Collector of Internal Revenue for the First Collection District of California, on the dates and in the amounts indicated below:

Date of Payment	George French, Jr.	Mary French
November 26, 1946.....	\$27,779.18	\$27,779.18
June 5th, 1947.....	4,939.41	4,938.47
Total Payments	<u>\$32,718.59</u>	<u>\$32,717.65</u>

No part of said total payments has been refunded or scheduled for refund to plaintiffs, or either of them.

6. That at all times during the period from November 15, 1938, to May 31st, 1943, Oranges Brothers Construction Department was a partnership, carrying on a general contracting business at Stockton, California; that at all of said times, plaintiff George French, Jr., was employed as the Superintendent of Construction by said Oranges Brothers Construction Department; that such employment was on a fixed salary and commission basis under an agreement of employment whereby the said George French, Jr., was to receive a fixed salary of \$150.00 per month and also was entitled to receive one-half (1/2) of the net profits of said construction and contracting business. That George French, Jr., was simply an employee and was never a partner or joint venturer in or with Oranges Brothers Construction Department.

7. That George French, Jr., received for his personal services under said contract of employment a total compensation of \$429,196.69, of which 4.85% or \$20,827.87 was received prior to January 1st, 1943, and 95.15% or \$408,368.82 was received during the taxable year 1943, to wit, the sum of \$75,-062.50 on February 8th, 1943, and \$333,306.32 after May 31st, 1943.

8. There is attached to each plaintiff's 1943 income tax return a Schedule "M" consisting of six pages of computations. The first page shows the allocation of income over the period of George French, Jr.'s, employment in accordance with the provisions of Section 107(a) Internal Revenue Code as follows:

GEORGE FRENCH, JR.

COMPENSATION RECEIVED FOR PERIOD OF MORE THAN 36 MONTHS (SEC. 107(a))

Period of Services November 15, 1938 to May 31, 1943

1. Received February 8, 1943, allocable over period of 51 months	\$ 75,062.50
2. Received after May 31, 1943, allocable over period of 55 months.....	333,306.32
Total	\$408,368.82

	Allocation of Item 1	Allocation of Item 2	Total
1938 2 months	\$ 2,943.63	\$ 12,120.24	\$ 15,063.87
1939 12 ''	17,661.77	72,721.37	90,383.14
1940 12 ''	17,661.77	72,721.37	90,383.14
1941 12 ''	17,661.77	72,721.37	90,383.14
1942 12 ''	17,661.74	72,721.37	90,383.11
1943 1 and 5 mos.....	1,471.82	30,300.60	31,772.42
Total	\$75,062.50	\$333,306.32	\$408,368.82

Total Compensation in 1943 and Prior Years

	Amount	Percent
1938	\$	
1939	1,500.00	
1940	1,800.00	
1941	1,800.00	
1942	15,727.87	
Total prior years.....	\$ 20,827.87	4.85
1943 as above.....	408,368.82	95.15
Total	\$429,196.69	100.00

9. The last page of said Schedule "M" contains a computation of the plaintiff's income tax liabilities on the income allocated to the calendar year 1942 which computation reads as follows:

Year 1942	George French, Jr.	Mary E. French
Net income per amended return	\$ 7,764.34	\$ 7,764.33
Amount taxable per sec. 107(a)	45,191.55	45,191.56
Total for computation.....	\$52,955.89	\$52,955.89
Less:		
Personal exemption	\$454.17	\$745.83
Credit for dependent	291.67	\$745.83
Surtax net income.....	\$52,210.05	\$52,210.06
Less: earned income credit..	1,400.00	1,400.00
Balance subject to normal tax	\$50,810.05	\$50,810.06
Normal tax	\$ 3,048.60	\$ 3,048.60
Surtax	24,698.63	24,698.64
Total	\$27,747.23	\$27,747.24
Less income tax per item 17, p. 4.....	1,598.96	1,598.96
Balance tax at 1942 rate.....	\$26,148.27	\$26,148.28

The plaintiffs did not claim forgiveness of seventy-five per cent (75%) of their 1942 income tax liabilities in accordance with Section 6 of the Current Tax Payment Act.

10. Plaintiffs' said income tax returns, both for the calendar year 1943, were audited by Internal Revenue Agent, Robert L. Driscoll, who made a report dated July 5th, 1945, holding that George French, Jr., was a partner in Oranges Brothers Construction Department instead of an employee, and that therefore the plaintiffs' 1943 income taxes must be computed without reference to the provisions of Section 107(a) of the Internal Revenue Code.

11. Plaintiffs filed a protest with the Internal Revenue Agent in Charge at San Francisco, California, and after a hearing upon the said protest, a conference report was issued under date of February 25, 1947. The said conference report sustained the determination of Internal Revenue Agent Driscoll that George French, Jr., was a partner in Oranges Brothers Construction Company, and assessed a total income and victory tax liability for the said year 1943 against George French, Jr., in the amount of \$97,293.23, and a deficiency of \$32,718.59 consisting of income taxes in the amount of \$28,143.10 and interest in the amount of \$4,575.49. That the said deficiency in the total amount of \$32,718.59 was paid in full by George French, Jr., to the defendant James G. Smyth, who was then Collector of Internal

Revenue for the First Collection District of California, upon the following dates, to wit:

November 26, 1946.....	\$27,779.18
June 5, 1947.....	4,939.41

That said conference report assessed a total income and victory tax liability against Mary E. French for the said year 1943 in the amount of \$97,291.87 and assessed a deficiency of \$32,717.65 consisting of taxes in the amount of \$28,142.33 and interest in the amount of \$4,575.32. That said assessed deficiency in the total amount of \$32,717.65 was paid in full by the plaintiff Mary E. French to the defendant James G. Smyth, who was then Collector of Internal Revenue for the First Collection District of California, on the following dates, to wit:

November 26, 1946.....	\$27,779.18
June 5, 1947.....	4,938.47

12. That on the 28th day of December, 1948, and within the time allowed under the provisions of Internal Revenue Code Section 322(b)(3) thereof, plaintiffs caused to be prepared, executed and filed, claims for the refund of taxes and interest assessed by the Commissioner of Internal Revenue for the year 1943, and collected by the defendant Smyth on the dates above set forth. That each of the said claims for refund contains the following statement of grounds why the said refund claims should be allowed:

“The claimant was assessed in error deficiencies in income and victory taxes for the taxable period

shown above, which were paid in full on November 26, 1946, and June 5, 1947, on the basis of a report of Internal Revenue Agent Robert L. Driscoll dated July 5, 1945, and a conference statement under the symbols 'IRA:Conf. HVH' issued by the office of the Internal Revenue agent in charge at San Francisco, California, under date of February 25, 1947, which report and statement are incorporated herein by reference. The whole amount of the deficiencies \$28,143.10, is claimed for refund with the interest paid thereon \$4,575.49, together with the interest on the total overpayment claimed for refund according to law.

“The claimant claims specifically as a basis for the refund claimed herewith that his Form 1040 income and victory tax return for the calendar year 1943, showing a total income and victory tax liability of \$69,150.12, and his amended Form 1040 income tax return for the calendar year 1942, were in all respects true and correct returns of his taxable income and income and victory taxes for those years, and that the assessments of deficiencies on the said return for the calendar year 1943, were, with reference to the report and statement described above and incorporated herein by reference, based on the following errors:

“(1) The disallowance of the application of the provisions of Section 107, Internal Revenue Code, in limitation of his income and victory tax liability on compensation for services received in 1943, for services during and for a

period of more than 36 months, as computed in his said return for 1943:

“(2) The computation of his income from services during the years 1942 and 1943, on the theory that, and as if he had been a member of a partnership, Oranges Brothers Construction Division; and * * *”

13. That by registered notice dispatched on November 7th, 1949, each plaintiff herein was notified that the said claims for refund had been disallowed in their entirety by the Commissioner of Internal Revenue.

14. The parties hereto have stipulated that in the event the plaintiffs are entitled to recover judgment against defendant Harold A. Berliner, judgment against Harold A. Berliner should be in favor of the plaintiff George French, Jr., in the amount of \$19,726.79 with interest thereon from March 15, 1944, and in favor of the plaintiff Mary E. French in the amount of \$19,490.80, with interest thereon, from March 15, 1944.

15. The parties have stipulated that in the event the Court shall find for the plaintiff George French, Jr., as against the defendant James G. Smyth, judgment shall be entered against the defendant James G. Smyth for \$32,718.59, with interest on \$27,779.18 from November 26, 1946, and with interest on \$4,939.41 from June 5th, 1947.

16. The parties have stipulated that in the event the Court shall find for the plaintiff Mary E.

French, as against the defendant James G. Smyth, judgment shall be entered against the defendant James G. Smyth for \$32,578.28, with interest on \$27,639.81 from November 26th, 1946, and with interest on \$4,938.47 from June 5th, 1947.

Conclusions of Law

1. Plaintiffs have complied with all of the statutory requirements constituting conditions precedent to the institution and maintenance of this action against the defendant James G. Smyth.

2. This Court has jurisdiction under Title 28 USC Section 1340.

3. Plaintiffs are entitled to compute their income tax liabilities for the calendar year 1943, in accordance with the provisions of Section 107(a) Internal Revenue Code.

4. Plaintiff George French, Jr., is entitled to judgment against defendant James G. Smyth for \$32,718.59, together with interest on \$27,779.18 of said sum from November 26th, 1946, and with interest on \$4,939.41 from June 5th, 1947.

5. Plaintiff Mary E. French is entitled to judgment against defendant James G. Smyth for \$32,578.28 with interest on \$27,639.81 of said sum from November 26, 1946, and with interest on \$4,938.47 from June 5th, 1947.

6. The amended complaints assert against defendant Berliner a "ground upon which a refund is claimed" that was not included in the refund

claims filed with the Collector, to wit: A claim that plaintiffs are entitled to forgiveness of seventy-five per cent (75%) of the tax on income allocated to 1942, by virtue of Section 6 of the Current Tax Payment Act.

7. Plaintiffs cannot recover any sum against the defendant Harold A. Berliner.

Dated: This 4th day of November, 1952.

/s/ DAL M. LEMMON,

Judge of the United States
District Court.

Receipt of copy acknowledged.

Lodged October 28, 1952.

[Endorsed]: Filed November 4, 1952.

In the District Court of the United States in and
for the Northern District of California,
Southern Division

No. 6257

GEORGE FRENCH, JR.,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,
and HAROLD A. BERLINER, Former Col-
lector of Internal Revenue,

Defendants.

No. 6258

MARY E. FRENCH,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue,
and HAROLD A. BERLINER, Former Col-
lector of Internal Revenue,

Defendants.

JUDGMENT

The above-entitled causes having been submitted to the Court without a jury for decision upon the evidence, oral and documentary, introduced at the trial of the actions against the defendant James G. Smyth on September 20th and 21st, 1950, such evidence being supplemented by specified documents and stipulated facts, and the Court having heretofore made and cause to be filed herein its written Findings of Fact and Conclusions of Law, and being fully advised;

Wherefore, by reason of the law and the Findings of Fact aforesaid,

It Is Ordered, Adjudged and Decreed that the plaintiffs do have and recover of and from the defendants as follows:

1. That plaintiffs, and either of them, take nothing against the defendant Harold A. Berliner.

2. That plaintiff George French, Jr., recover of and from the defendant James G. Smyth the sum of \$32,718.59 together with interest thereon at the rate of six per cent (6%) per annum from the date

of payment specified below, to a date preceding the date of the refund check by not more than thirty (30) days, to wit:

(a) On \$27,779.18 from November 26, 1946.

(b) On \$4,939.41 from June 5, 1947.

3. That plaintiff Mary E. French recover of and from the defendant James G. Smyth the sum of \$32,578.28 together with interest thereon at the rate of six per cent (6%) per annum from the date of payment specified below, to a date preceding the date of the refund check by not more than thirty (30) days, to wit:

(a) On \$27,639.81 from November 26, 1946.

(b) On \$4,938.47 from June 5, 1947.

The Court hereby certifies that there was probable and reasonable cause for the act of the defendant James G. Smyth, former Collector of Internal Revenue, in demanding and collecting from the plaintiffs the income taxes for the refund of which this judgment is entered.

Dated This 4th Day of November, 1952.

/s/ DAL M. LEMMON,

Judge of the United States
District Court.

Receipt of copy acknowledged.

[Endorsed]: Filed November 4, 1952.

Entered November 4, 1952.

[Title of District Court and Causes.]

Nos. 6257 and 6258

NOTICE OF APPEAL

George French, Jr., and Mary E. French, the plaintiffs in the above-entitled actions, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the portion of the judgment hereinafter designated, which judgment was dated, filed and entered on November 4, 1952. The portion of the judgment appealed from reads as follows:

“1. That plaintiffs, and either of them, take nothing against the defendant Harold A. Berliner.”

Dated: December 30th, 1952.

GEORGE FRENCH, JR.

MARY E. FRENCH,

By /s/ CLYDE C. SHERWOOD,
Attorney for Plaintiffs.

[Endorsed]: Filed January 2, 1953.

[Title of District Court and Causes.]

Nos. 6257 and 6258

STATEMENT OF POINTS ON APPEAL

The plaintiffs and appellants George French, Jr., and Mary E. French, in accordance with the provisions of Rule 75(d) of the Federal Rules of Civil Procedure state that the points upon which they intend to rely on their appeal are:

1. The refund claims filed by plaintiffs on December 28, 1948, with the then Collector of Internal Revenue, copies of which refund claims are attached to the original complaints on file in the above-entitled actions, are sufficient within the meaning of Section 3772 of the Internal Revenue Code and pertinent Treasury Regulations to sustain the recoveries sought in the amended complaints on file in the above-entitled actions against the defendant Harold A. Berliner, computed on the basis of the forgiveness provisions of Section 6 of the Current Tax Payment Act of 1943, 26 USCA, Internal Revenue Acts, pages 406-411.

GEORGE FRENCH, JR.,

MARY E. FRENCH,

By /s/ CLYDE C. SHERWOOD,

Attorney for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed January 7, 1953.

[Title of District Court and Causes.]

Nos. 6257 and 6258

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

Complaint (6257).

Complaint (6258).

Answer (6257).

Answer (6258).

Demand for jury trial (6257).

Demand for jury trial (6258).

Special verdict.

Judgment on special verdict.

Notice of motion for a new trial.

Order granting motion for a new trial.

Motion for leave to file amended complaint and to join Harold A. Berliner as a party defendant (6257).

Motion for leave to file amended complaint and to join Harold A. Berliner as a party defendant (6258).

Motion to reconsider order granting a new trial and to reinstate verdict.

Order granting leave to file amended complaint, etc.

Amended complaint (6257).

Amended complaint (6258).

Answer to amended complaint (6257).

Answer to amended complaint (6258).

Stipulation waiving trial by jury.

Stipulation of facts.

Memorandum opinion and order.

Findings of fact and conclusions of law.

Judgment.

Defendants' notice of appeal (6257).

Defendants' notice of appeal (6258).

Plaintiffs' notice of appeal.

Cost bond on appeal.

Statement of points on appeal.

Designation of contents of record on appeal.

Plaintiffs' exhibits 1 to 7, inclusive.

Defendants' exhibits A to D, inclusive.

Order extending time to docket appeal.

Order extending time to docket appeal.

In Witness Whereof, I have hereunto set my hand and the Seal of said Court, this 27th day of February, 1953.

C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSON,
Deputy Clerk.

[Endorsed]: No. 13729. United States Court of Appeals for the Ninth Circuit. George French, Jr., and Mary E. French, Appellants, vs. Harold A. Berliner, former Collector of Internal Revenue, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Northern Division.

Filed February 28, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13729

JAMES G. SMYTH, Collector of Internal Revenue,
and HAROLD A. BERLINER, Former Collector
of Internal Revenue,
Defendants and Appellants,

vs.

GEORGE FRENCH, JR., and MARY E.
FRENCH,
Plaintiffs and Appellees,

GEORGE FRENCH, JR., and MARY E.
FRENCH,
Plaintiffs and Appellants,

vs.

HAROLD A. BERLINER, Former Collector of
Internal Revenue,
Defendant and Appellee.

STATEMENT OF POINTS AND AMENDED
DESIGNATION OF RECORD ON APPEAL

George French, Jr., and Mary E. French, Plaintiffs and Appellants herein, hereby adopt the Statement of Points on Appeal filed January 7, 1953, on behalf of Plaintiffs and Appellants in the District Court of the United States in and for the Northern District of California, Southern Division (Actions Nos. 6257-6258), as compliance with the provisions of Rule 19(6) of the above-entitled Court.

George French, Jr., and Mary E. French, Plaintiffs and Appellants herein, hereby withdraw the Designation of Record contained in "Statement of Points and Designation of Record on Appeal" filed March 5, 1953, and, in accordance with Rule 19(6) hereby designate the following portions of the record, proceedings and evidence as the portions to be contained in the record on appeal:

1. Original complaints, together with exhibits attached thereto, of George French, Jr., and Mary E. French, respectively, and the answers thereto:
2. Judgment on special verdict;
3. Notice of motion for new trial;
4. Order granting motion for new trial;
5. Amended complaints of George French, Jr., and Mary E. French, respectively, and the answers thereto;
6. Plaintiffs' Exhibit 6, 1943 income tax returns for George French, Jr., and Mary E. French;
7. Plaintiffs' Exhibit 7, Conference Report dated 2-25-1947;

8. Motions of George French, Jr., and Mary E. French, respectively, for leave to file amended complaints and to join Harold A. Berliner as a party defendant, exclusive of amended complaints and memoranda of points and authorities in support of motions.

9. Affidavits of Frank C. Scott in support of plaintiffs' motion for leave to file an amended complaint attached to each of the motions specified under paragraph 8;

10. Order entered December 13, 1951, denying motion of defendant James G. Smyth to reconsider the order granting a new trial and to reinstate jury verdict and granting plaintiffs' motion for leave to file amended complaints and to join Harold A. Berliner as a party defendant;

11. Stipulation of the parties dated July 24, 1952, and filed July 26, 1952, exclusive of Exhibit E through L attached thereto;

12. Memorandum opinion filed October 14, 1952;

13. Findings of fact and conclusions of law filed November 4, 1952;

14. Judgment entered November 4, 1952.

Dated: March 20, 1953.

SHERWOOD & LEWIS,

By /s/ CLYDE C. SHERWOOD,

Attorneys for Plaintiffs and Appellants George French, Jr. and Mary E. French.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1953.

